FILE

BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Application of Ohio Edison Company, The Cleveland Electric Illuminating Company and The Toledo Edison Company for Approval of Rider FUEL and Related Accounting Authority	)	Case No. 09-21-EL-ATA 09-22-EL-AEM 09-23-EL-AAM

Motion for Extension of Time and to Apply Procedural Precedent, Including Request for Expedited Treatment, and Memorandum in Support Thereof

In its Finding and Order of January 14, 2009, in the above captioned docket, the Public Utilities Commission of Ohio ("Commission") directed Ohio Edison Company ("OE"), The Cleveland Electric Illuminating Company ("CEI"), and The Toledo Edison Company ("TE") (collectively, the "Companies"):

> to make an appropriate filing, by February 2, 2009, which includes testimony and provides information sufficient for the Commission to conduct a prudency review of the costs incurred in purchasing power for customers receiving generation service pursuant to the companies' power supply agreement and information sufficient for the Commission to consider whether the recovery of such costs is necessary to avoid a confiscatory result.

The Commission went on to state that:

> The attorney examiner will issue an entry which will set forth the procedural schedule, set a hearing date, and provide due process for review of the Companies' filing.

Finding and Order, p. 7.

By this Motion, the Companies request that the Commission extend the period in which the referenced filing be made until February 13, 2009 and, with respect to that part of the directive relating to the prudence review, that the Commission (or the Attorney

Examiner) apply the procedure set out in prior Commission precedent relating to prudence cases in the matter at bar. The Companies' request is not made to needlessly delay this proceeding and the Companies' submit that the brief extension of time requested will not unduly prejudice any party. Because the current February 2 due date for the Companies' filing is only slightly more than a week away, the Companies request the Commission's expedited consideration under O.A.C. § 4901-1-12(C)[1] and granting of the within Motion.

The additional time requested in which to make their filing reflects that the Companies anticipate that preparation of the filing will require considerable analysis and preparation of materials, including testimony, in order to respond to the Commission's directive. While underway, that task alone is substantial and will be extraordinarily difficult to complete in the time period allotted. Other contemporaneous factors, however, further exacerbate the situation.

In particular, with respect to the inquiry as to whether the Companies may face a confiscatory result, the Commission's just issued Opinion and Order in Case No. 07-551-EL-AIR will require evaluation by the Companies to determine the extent to which it may impact the analysis and Companies' filing. Moreover, the Companies will soon file an Application for Rehearing from the January 14, 2009 Finding and Order in Case No. 09-21-EL-ATA raising the issue of whether there should be an inquiry *vis-à-vis* a "confiscatory result" at all. The primary basis for that argument in the Application is that the Order unreasonably and unlawfully requires a review of whether the recovery of the Companies' wholesale costs is necessary to avoid a confiscatory result, when recovery of those costs is mandated by Ohio law, the federal filed rate doctrine, and the Supremacy

[1] The Companies do not certify that no party objects to expedited consideration.

Clause of the U.S. Constitution. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 372 (1988) ("[s]tates may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates."); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986). Depending on the resolution of that issue, it may not be appropriate (or at least may be unnecessary) for any filing to be made on that issue. Accordingly, independent of the extension of time requested herein, the Companies request that the Commission suspend the requirement for the Companies to make any filing with respect to the "confiscatory result" issue pending resolution of the issue to be raised in the Application for Rehearing.

In addition, multiple parties have already served discovery requests on the Companies in this case for which the process of preparing responses is underway. That response effort, however, necessarily draws on the same resources and personnel that will be involved in assembling the Companies' filing. Moreover, based on the extent of intervention already by a number of parties whose past participation (including discovery) in the Companies' cases has been active and substantial,[2] the Companies anticipate that the discovery process is likely to escalate significantly and rapidly, thus adding to the burden of contemporaneously preparing the filing at the Commission as well as responding to discovery in a timely manner.[3] As a result, the additional time, until February 13, will be required in order to fully prepare the Companies' filing while contemporaneously responding to discovery.

[2] As of January 22, 2009, the Commission docketing information system reflected that eleven separate motions for intervention have been filed in this case.

[3] Indeed, the expected intensity of the discovery which will be sought in this case is highlighted by the pending requests that the discovery response process for this case be expedited. See OCEA Motion to Dismiss and, in the alternative, Motion for Expedited Discovery and Motion to Set the Matter for Hearing, filed January 13, 2009; Letter, Kroger Company, filed January 20, 2009, in support of the OCEA motion.

The aspect of this Motion requesting the application of prior procedural precedent is directed just to the Commission's initiation of a prudence review. The Commission has directed the Companies to file materials to allow the Commission's review of the prudence of the costs incurred in purchasing power for customers receiving generation service. The Commission has established precedents for the procedure applicable to such prudence reviews, in particular with respect to the recognition of the presumption of management prudence which attaches to utility decision-making and the effect of that presumption on the sequence of evidentiary production. While there is no dispute that the burden of proof in such a prudence review is (and would remain) on the Companies throughout, because of the presumption of prudence, the burden of going forward with evidence shifts to those entities challenging any particular aspects of prudence of management decision-making. The matter was thoroughly considered and decided by the Commission in the cases addressing the prudence issues associated with construction of the Perry nuclear plant. The rationale is fully explained in the Entry of the Attorney Examiner which established the procedure in those cases:

> The Attorney Examiner finds that the burden of initially going forward with evidence should be upon those parties, including the Staff, who seek to challenge the reasonableness of expenditures made on the Perry project. Although the burden of proof in this proceeding rests with the companies, there is an obligation upon those suggesting imprudent management or unreasonable costs to go forward with some concrete evidence supporting their position before that burden is triggered. The Dayton Power & Light Company, Case No. 78-92-EL-AIR, Opinion and Order dated March 9, 1979, at 20. This obligation exists because of the principle that utility investment is presumed to have been prudently made, unless the contrary is shown. *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Commission, 262 U.S. 276 at 289 n. 1 (1923); West Ohio Gas Co. v. Public Utilities Commission, 294 U.S. 63 at 68, 72 (1935).* More recently, the Commission also indicated that in assessing the prudence of a utility's decision, there should exist a presumption that decisions of utilities are prudent. Syracuse Home Utilities Company, Inc., Opinion and Order dated

> December 30, 1986, at 10. Thus, while the burden of proof remains with the companies to demonstrate the reasonableness or prudence of the expenses incurred in the construction of Perry, the presumption of prudence or reasonableness shifts to a challenger the duty of producing evidence to rebut the presumption. Accordingly, parties seeking to challenge the reasonableness or prudence of Perry expenditures will be required to place their evidence into the record first.

In the Matter of the Investigation into the Perry Nuclear Power Station, Case No. 85-521-EL-COI ("*In re Perry*"), Entry (February 27, 1987).

On interlocutory appeal, the Commission affirmed the Attorney Examiner's Entry (*In re Perry,* Commission Entry (March 17, 1987)), and in its Opinion and Order deciding all the issues presented in the first phase of the Perry investigation, again affirmed the applicability of the presumption of prudence and the resultant procedural sequence of the presentation of testimony. *In re Perry,* Opinion and Order (January 12, 1988). In the second phase of the Perry prudence inquiry, the Commission again adopted the same procedure. *In re Perry,* Entry (March 15, 1988).

In applying that precedent to this case, the Companies submit that in establishing the procedure and schedule for this case, the Commission should provide that the Companies' first filing (on February 13, or in the event that the Motion for an Extension of Time is not granted, February 2) be comprised of materials describing the process incurred in purchasing power and related data, but (in light of the presumption of prudence applicable in this case) not requiring at that time the presentation of evidence that such costs were prudent. The Companies' submission could include, for example, the Final Post-RFP Report submitted by CRA International, Inc. (the RFP manager), and the information that was available to bidders including Bidder Rules, the RFP Supply Agreement and RFP Frequently Asked Questions. As to testimony (and evidentiary

materials supported by testimony), the sequence of the filing of testimony (and its presentation at hearing) should be set so that testimony is first required of and filed by intervenors (and the Staff) who may be challenging some aspect of the prudence of the Companies' power purchase activities. Such testimony would be developed based on the materials in the Companies' first filing as well as upon the discovery undertaken by those parties. After the filing of any such testimony, and if the Commission believes that the evidence overcomes the presumption of prudence, the Companies would then file their responsive testimony.[4] As noted, a similar sequence of the intervenors proceeding first, followed by the Companies, would apply to the presentation of evidence at hearing.

Such a process is consistent not only with the procedural precedent long in place for the consideration of matters involving inquiries into management prudence, but consistent as well with the orderly presentation of evidence before the Commission. Without such a process, the Companies are placed in the unfair and difficult position of having to anticipate and rebut, at risk of waiver, a wide range of possible attacks on the prudence of their actions. As the Commission stated in affirming the procedure established by the Attorney Examiner in the Perry investigation:

> Under these circumstances, it is reasonable to conclude that there is an obligation upon those suggesting imprudent management or unreasonable costs to present some concrete evidence supporting their claims before the companies are required to respond. The alternative to this procedure is to put the Perry owners to the task of justifying the prudence and reasonableness of the cost of each item and each phase of Perry's construction even though no other party may be seriously contesting particular costs. The more reasonable approach is that those parties who challenge the reasonableness and prudence of specific Perry expenditures should be required to come forward with some evidence suggesting

[4] Consistent with the precedent, the Commission may at that point permit rebuttal testimony by the intervenors, but consistent with the principle that the party with the burden of proof is entitled to close the presentation of testimony, surrebuttal testimony would also be permitted. *In re Perry*, Entry (February 27, 1987).

> imprudence or unreasonableness. The Perry owners will then be apprised of exactly which expenditures and which management actions they are required to prove were reasonable and prudent. This approach is in accord with the above-cited law on the effect of an evidentiary presumption as well as prior Commission precedent.

In re Perry, Commission Entry (March 17, 1987).[5] By having Staff and any party challenging the prudence of the purchases at issue here present their testimony and evidence first, the Commission would necessarily and appropriately narrow the issues for the Companies to address and for the Commission to consider.

For the foregoing reasons, the Companies request the Commission act on an expedited basis to: 1) grant the brief extension of time requested in which to make their filing currently due on February 2, 2009; 2) further clarify and set forth that the procedure for the filing and presentation of testimony and evidence with respect to the prudence review in this case be consistent with the Commission's past precedent and the process described above; and, 3) suspend the requirement for the Companies to make any filing with respect to the "confiscatory result" issue pending resolution of the issue to be raised expeditiously in an Application for Rehearing.

[5] However, where a report of an auditor of the Staff has been submitted to first frame the issues of prudence, such as in GCR audits and rate cases, the Commission has required the utility to present its evidence first while still recognizing the presumption of prudence. *See, e.g., In re Regulation of the Purchased Gas Adjustment Clause of Vectren Energy Delivery of Ohio, Inc.*, Case No. 04-220-GA-GCR, Opinion and Order (Apr. 11, 2007). Because no similar report will be filed in this case, the *Perry* procedures are appropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served upon the following via regular U.S. Mail, this 23rd day of January, 2009. A copy was also served via electronic mail on those parties with email addresses listed below.

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